No. 03-6539

Supreme Court, U.S.
FILED
OCT 24 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JAY SHAWN JOHNSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1371
Fax: (415) 703-1234
Counsel for Respondent

17 pp

QUESTIONS PRESENTED

1. Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

2. Whether *Batson* requires state reviewing courts to engage in comparative juror analysis for the first time on appeal.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT	2
ARGUMENT	3
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Cases	
Batson v. Kentucky 476 U.S. 79 (1986)	i, 3, 5-10
Burks v. Borg 27 F.3d 1424 (9th Cir. 1994)	9
Cooperwood v. Cambra 245 F.3d 1042 (9th Cir. 2001)	4
Fernandez v. Roe 286 F.3d 1073 (9th Cir. 2002)	4, 6
Furnco Construction Corp. v. Waters 438 U.S. 567 (1978)	5
Hernandez v. New York 500 U.S. 352 (1991)	7
McClain v. Prunty 217 F.3d 1209 (9th Cir. 2000)	9
McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973)	5
Miller-El v. Cockrell 537 U.S. 322 (2003)	7, 8
People v. Wheeler 22 Cal. 3d 258 (1978)	2-5, 7

TABLE OF AUTHORITIES (continued)

	Page
Swain v. Alabama 380 U.S. 202 (1965)	7
Texas Dept. of Community Affairs v. Burdine 450 U.S. 248 (1981)	5
United States v. Armstrong 517 U.S. 456	6, 10
United States v. Chinchilla 874 F.2d 695 (9th Cir. 1989)	8, 9
Wade v. Terhune 202 F.3d 1190 (9th Cir. 2000)	2, 4-7

Constitutional Provisions

United States Constitution	
Fourteenth Amendment	1
§ 1	1

Statutes

28 United States Code	
§ 1257(a)	1
§ 2254(d)	4
California Civil Procedure Code	
§ 226(b)	5
§ 231.5	7

TABLE OF AUTHORITIES (continued)

	Page
Court Rules	
California Supreme Court Rule	
rule 10(b)	3
rule 14.1(a)	3
Other Authorities	
9 Wigmore, Evidence, § 2494 (Chadbourne rev. ed. 1981)	5
Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")	4, 7, 9
Equal Protection Clause	5

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-6539

JAY SHAWN JOHNSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. A) is reported at 30 Cal. 4th 1302, 71 P.3d 270, 1 Cal. Rptr. 3d 1. The opinion of the California Court of Appeal (Pet. App. B) is unofficially reported at 105 Cal. Rptr. 2d 727.

JURISDICTION

The judgment of the California Supreme Court was entered on June 30, 2003. The petition for a writ of certiorari was filed September 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT

1. Petitioner, an African-American, murdered the Caucasian 19-month-old daughter of his girlfriend. Pet. App. A 1306, 1326.[1/]

2. During jury selection, the prosecutor exercised 12 peremptory challenges, 3 of which were to used to challenge all of the African-American prospective jurors. Pet. App. A 1307. Citing *People v. Wheeler*, 22 Cal. 3d 258 (1978), which held "'that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates' the California Constitution," petitioner twice moved to quash the venire based on two of the challenges. Pet. App. A 1307, 1309. Applying *Wheeler*'s requirement that the objector establish a prima facie case by showing a "strong likelihood" of group bias, the trial court denied the motions. Pet. App. A 1307-08.

3. A divided panel of the California Court of Appeal reversed. Pet. App. B 338. Adopting the analysis of the Ninth Circuit Court of Appeals in *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), the state appellate court concluded that the "strong likelihood" standard adopted in *Wheeler* and applied by the trial court violated *Batson v. Kentucky*, 476 U.S. 79 (1986), which requires the objector to raise "'an inference of discriminatory purpose.'" Pet. App. A 1306, 1308; Pet. App. B 324-25. "Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that 'a prima facie case of group bias was established and that the judgment must therefore be reversed.'" Pet. App. A 1308. Justice Haerle dissented on all points. Pet. App. A 1308; Pet. App. B 338-48.

4. The California Supreme Court reversed the court of

---

1. Petitioner neither reformatted nor renumbered the opinions included in the Appendix. Appendix page citations are therefore to the page of the opinion as provided by the reporter.

appeal. The supreme court "conclude[d] that *Wheeler*'s terms, a 'strong likelihood' and a 'reasonable inference,' refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." Pet. App. A 1306. The court "also conclude[d] that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal." Pet. App. A 1306. The supreme court upheld "the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly." Pet. App. A 1306.

Two justices would have affirmed the state court of appeal based on their belief that *Wheeler*'s "strong likelihood" standard is inconsistent with *Batson*. Pet. App. A 1328-29, 1333-41.

ARGUMENT

Although respondent believes the decision of the California Supreme Court is correct, respondent agrees with petitioner that the case warrants this Court's review. Because petitioner's questions presented are "argumentative [and] repetitive," Sup. Ct. R. 14.1(a), review should be predicated on the questions as reframed above.

1. The nature of the prima facie case burden under *Batson* is an important federal question, and the California Supreme Court and the Ninth Circuit have issued squarely conflicting opinions on the extent of that burden. See Sup. Ct. R. 10(b).

a. The Ninth Circuit in *Wade* stated that "unlike the *Batson* Court, which required only that the defendant 'raise an inference' of discrimination, the *Wheeler* Court demanded that the defendant 'show a strong likelihood' that the prosecutor had excluded venire members from the petit jury on account of their race." 202 F.3d at 1195-96. "The California Supreme Court now routinely insists, despite *Batson*, that a defendant must

show a 'strong likelihood' of racial bias." *Id.* at 1197. The court concluded that "the *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test" and "therefore . . . that California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*." *Id.* Based on its belief that California courts are applying the wrong standard, *Wade* concluded that it "need not—indeed, should not—give deference [under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d),] to their determination that a defendant has failed to establish a *prima facie* case of bias." *Id.*

The Ninth Circuit rigorously adheres to this view. See *Cooperwood v. Cambra*, 245 F.3d 1042, 1046 (9th Cir. 2001) ("The 'strong likelihood' standard . . . does not accord with the one announced in *Batson*, which merely requires that there be a 'reasonable inference' that the peremptory challenge is being used on the basis of race."); *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002) (*Wheeler* "erroneously required a defendant to show a 'strong likelihood' of discrimination in order to establish a *prima facie* case rather than just an 'inference' of discrimination as required by *Batson*."); *id.* at 1079-80 (finding on de novo review a prima facie case from an inference of discrimination based on "a bare record of statistical disparities" and remanding for an evidentiary hearing).

b. The California Supreme Court below noted that *Wade* had not "examine[d] what *Wheeler* or the high court meant by the word 'inference' in this context," Pet. App. A 1314, and emphatically disagreed with the Ninth Circuit's conclusion. "The term 'strong likelihood' has never set a higher standard than *Batson* permits." Pet. App. A 1317. "*Wheeler*'s standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with *Batson*. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other

party's peremptory challenges, if unexplained, were based on impermissible group bias." Pet. App. A 1318.

The California Supreme Court correctly identified the proper standard based on *Batson*'s recognition that this Court's "decisions under title VII of the Civil Rights Act of 1964 'explained the operation of prima facie burden of proof rules.'" Pet. App. A 1314. Cases such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and treatises such as 9 Wigmore, Evidence, § 2494 (Chadbourne rev. ed. 1981) demonstrate that establishing a prima facie that will shift the burden of production requires the party with the initial burden to prove by a preponderance of the evidence facts that if otherwise unexplained entitle the party to relief. Pet. App. A 1314-16.

Moreover, in order to overcome California's peremptory challenge statute, which provides that "no reason need be given for a peremptory challenge," Cal. Civ. Proc. Code § 226(b), and render it unconstitutional as applied, the objector must demonstrate a constitutional violation. The Equal Protection Clause does not invalidate state laws as applied when it is more likely than not there was *no* discriminatory group bias.

d. The state supreme court has thus rejected *Wade*, its conclusion that *Wheeler* is more onerous than *Batson*, and its incorrect standard for establishing a prima facie case.

Therefore, not only does the conflict concern a question of great importance—the standard by which courts evaluate claims that peremptory challenges by civil and criminal litigants violate the Equal Protection Clause—the conflict exists between the California Supreme Court and the federal appellate court for the circuit in which California is located. That split poses a tremendous burden on California.

Using the "raise an inference" standard mandated by *Wade*, federal habeas courts reevaluate de novo every California criminal case with a *Batson* claim in which the state court has

found no prima facie case. That standard's lack of content (augmented by comparative jury analysis as discussed below) often results in finding a prima facie case for the first time on federal habeas corpus review. Because the state court never found a prima facie case, the trial prosecutor never had occasion to state reasons for the peremptory challenges in the trial court This necessitates an evidentiary hearing in the federal habeas corpus proceeding at which the trial prosecutor, if available, has to testify. If the prosecutor is unavailable or unable to recall the reasons for the challenges, the judgment will be reversed. *Batson*, 476 U.S. at 100 ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."). If reasons are given, then years later and without the benefit of having observed voir dire (even though such observation is an important part of detecting discriminatory challenges, *United States v. Armstrong*, 517 U.S. 456, 467-68 (1996)), the district court determines whether peremptories were exercised discriminatorily. Cf. *Fernandez*, 286 F.3d 1073 (finding prima facie case in 2002 and remanding for evidentiary hearing concerning 1995 trial).

The current split of authority, if unresolved, will (1) lead to mistaken findings by federal habeas courts under *Batson*; (2) sap unnecessarily California's strained resources as it engages in collateral litigation that would be avoided by application of the proper standard; and (3) create unacceptable risks that valid state judgments (including death penalty judgments long since final in state court but only slowly working their way through the federal habeas process) will be erroneously vacated.

e. The split of authority should be resolved at the earliest opportunity. Nothing can be gained from allowing more cases to be affirmed in state court under the California Supreme Court's decision in this case but then, potentially, vacated on federal habeas corpus review under *Wade*.

Although California could theoretically obtain review of

this split of authority from a judgment of the Ninth Circuit, that possibility is an unsatisfactory alternative. It is impossible to know when an appropriate case would present itself. When a prima facie case is found under the improper *Wade* standard but reasons for the challenges are given in the district court, the erroneous application of *Wade* will have worked substantial harm but be insulated from review as the existence of a prima facie case would be moot. *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality). In a case in which the prima facie case question was not moot, other circumstances, such as alternate holdings, might preclude review by certiorari. Prevailing in this Court in a collateral proceeding governed by the AEDPA would not fully vindicate California if the decision turned on AEDPA deference as the Ninth Circuit might conclude that *Wade* should still control pre-AEDPA cases, which would include a substantial portion of the capital docket.

Finally, as articulated by the California Supreme Court, "California's reviewing courts are as ready as any to combat the pernicious effects of racial and other discrimination, in jury selection as in other matters." Pet. App. A 1328. Indeed, in 1978, *Wheeler* led the Nation by announcing a new method of evaluating claims of discrimination in peremptory challenges and rejecting the burden articulated in *Swain v. Alabama*, 380 U.S. 202 (1965), steps this Court took in 1986 in *Batson*. California's legislature took the additional step of codifying the ban on using challenges to exclude jurors based on group bias. Cal. Civ. Proc. Code § 231.5. If California is misapplying this Court's *Batson* jurisprudence, it has a significant interest in knowing now so that it might amend its procedures and continue to operate courtrooms free of discrimination.

2. Whether *Batson* and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), require reviewing courts to engage in comparative juror analysis for the first time on appeal is also an important federal question.[2/] Requiring such analysis would seriously disrupt the

---

2. Petitioner asserts that "California claims that, because

state's fact-finding process without any increase in the accuracy of the determination.

a. As the state supreme court reasoned, "[M]idtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal. And, given the inability of reviewing courts to reliably conduct such analysis on a cold record, those courts are not required to do so for the first time on appeal." Pet. App. A 1323.

The California Supreme Court correctly concluded that *Miller-El* does not compel comparative juror analysis for the first time on appeal. "[T]hat case merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court." Pet. App. A 1321.

b. The Ninth Circuit has a different view on the propriety of such analysis. In *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989), the Ninth Circuit "held that an appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the

---

comparative juror analysis was not used or allowed at trial under state law when this case was tried, it should not be utilized on appeal, either." Pet. 21. This misrepresents the state's position and the law. As stated by the California Supreme Court below, "We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have *never* prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case." Pet. App. A 1318 (second italics added). California's claim is simply that *Batson* does not compel reviewing courts to engage in such analysis *for the first time on appeal*.

prosecutor's credibility." *Burks v. Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994). *Burks* recognized that the California Supreme Court does not engage in comparative analysis for the first time on appeal and noted, "The U.S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." *Id.* The court held out the possibility that the failure to conduct such analysis on appeal might constitute inadequate appellate review, depriving the judgment of the presumption of correctness. *Id.* at 1428.

The Ninth Circuit has abandoned its cautious approach to using comparative analysis on habeas corpus. In *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000), relying on *Chinchilla* and ignoring *Burks,* the court evaluated the reasons given by the prosecutor for challenging certain jurors and twice concluded the reasons were pretextual "upon conducting a comparative analysis." *Id.* at 1221, 1222; see also *id.* at 1224 ("We conclude . . . [certain] reasons were pretextual based upon comparisons of voir dire responses . . . .").

c. California thus again faces a dilemma. State appellate courts will not engage in comparative analysis for the first time on appeal. Federal courts will use that analysis to conclude under the AEDPA that the state court unreasonably determined the facts and unreasonably rejected the *Batson* claim. Cf. *id.* at 1224. By engaging in comparative analysis for the first time on habeas review, the federal courts consider evidence not properly before the state appellate courts, evidence that if presented in the trial court could have been either rebutted or considered along with information that the federal courts do not have — the all important first-hand view of jury selection, including demeanor, tone, and shifting strategies. "During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges. He is in a position to discern whether

a challenge to a black juror has evidentiary significance; the significance may differ if the venire consists mostly of blacks or of whites." *Armstrong*, 517 U.S. at 467-68 (citation omitted). The federal habeas courts do not have that advantage and are unable to place the new information in the form of comparative analysis in its full and proper context.

If *Batson* requires altering the state's fact-finding scheme so that appellate courts are to find facts based on information not presented to the trial court, that requirement should be squarely announced. If *Batson* does not require the use of comparative analysis for the first time on appeal, that too should be squarely announced to terminate the Ninth Circuit's practice of using such analysis to reject as unreasonable state court decisions denying *Batson* claims.

CONCLUSION

Accordingly, respondent respectfully requests that the Court grant the petition for a writ of certiorari to consider the questions presented above.

Dated: October 23, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

SETH K. SCHALIT
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

SKS:jkh
SF2003US0003